89-482

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

BARBARA ANN WASHINGTON, AS GUARDIAN AD LITEM FOR CHRISTA M. WASHINGTON, A MINOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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30 pp

QUESTION PRESENTED

In this case, the court of appeals held that while two off-duty servicemen on a military base were working on a car owned by one of them, they were acting "within the scope of [their] * * * employment" within the meaning of the Federal Tort Claims Act, 28 U.S.C. 1346(b). The question presented is whether, in grounding this determination on the assertedly "unique" character of a military base, the court of appeals erroneously failed to determine whether under state law an analogous private employer would be liable under similar circumstances.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 868 F.2d 332. The opinion of the district court (App., *infra*, 8a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1989. A petition for rehearing was

denied on June 9, 1989 (App., *infra*, 16a). On September 5, 1989, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including September 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1346(b) (28 U.S.C.) provides, in pertinent part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for * * * personal injury * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2671 (28 U.S.C.) provides, in pertinent part:

> "Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States * * *, means acting in line of duty.

Section 2674 (28 U.S.C.) provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

STATEMENT

The facts are not disputed. On the evening of September 19, 1980, Larry Bartole and Neil Cleaves were in the garage of Cleaves' residence on the Point Mugu, California, naval base, attempting to start the engine of Cleaves' 1964 Rambler. Both men were active-duty members of the Navy on authorized liberty status, having completed their work for the day. In attempting to start the car, "neither Mr. Bartole nor Mr. Cleaves [was] performing any action connected with any of their official United States Navy duties." App., *infra*, 9a; see *id.* at 2a-3a; Tr. 25-26 (Pltf. Stip.)). When Bartole poured gasoline from a coffee can into the carburetor in an attempt to prime it, the engine backfired. Flames shot from the carburetor, igniting the gasoline in the can Bartole was holding. Gasoline spilled as Bartole jerked the can back, and his hand caught fire. Bartole then turned toward the side door of the garage, tripped, and spilled the can of flaming gasoline out of the door. Ten-year-old Christa Washington was just outside the door playing in the adjacent yard. She was struck by the flaming gasoline and was seriously burned. App., *infra*, 2a-3a, 9a-10a.

Suit to recover for Christa Washington's injuries was brought against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 (b), 2671 *et seq.* That Act provides, in Section 1346(b), that the United States is liable for "personal injury * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place

where the act or omission occurred." Following a trial, the district court held that "[n]o act or omission of any employee of the United States of America, while acting within the course and scope of his office or employment, caused, or in any way contributed to, the accident." App., *infra*, 15a. The court first noted that "[s]cope of employment for an active duty military employee means 'acting in the line of duty.' See 28 U.S.C. § 2671. The phrase 'line of duty,' in turn, is defined by the applicable state law of *respondeat superior*." *Id.* at 12a (citing *Williams* v. *United States*, 350 U.S. 857 (1955)). It then concluded that, "[u]nder the principles of *respondeat superior*, in California, the acts of Mr. Bartole and Mr. Cleaves herein, in attempting to start the privately owned Rambler automobile in their off-duty hours, were clearly their own, and done for personal purposes, totally unrelated to any United States Navy job or duty[,] * * * [and] thus [were] not within the course and scope of the employment of Mr. Bartole and Mr. Cleaves with the United States." App., *infra*, 12a. The district court added: "The imposition of *respondeat superior* liability upon the United States in this case would clearly be an imposition upon the military of a liability far broader than that of a private employer, and would be clearly contrary to the limited waiver of sovereign immunity attended by the Federal Tort Claims Act." *Id.* at 13a.[1]

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[1] The district court also held that the United States was not liable under California law as Christa Washington's landlord or as the owner of the land on which she was injured, because it "had no knowledge of the danger, [and did not] participate in any way in creating it." App., *infra*, 15a.

The court of appeals reversed. App., *infra*, 1a-7a. It noted that base regulations in effect at the time of the accident provided that residents were not to conduct " '*Fire Hazardous Operations* * * * prior to the establishment of adequate fire prevention measures.' " *Id.* at 4a.[2] The court then added that, in *Lutz* v. *United States*, 685 F.2d 1178, 1183 (9th Cir. 1982), it had concluded that "[m]ilitary housing presents a unique situation' " (App., *infra*, 5a), and in that case found that "the control of a serviceman's dog was * * * a military duty imposed for the benefit of the Air Force by Air Force regulations on the dog's owner who was in base housing" (*id.* at 6a). The court here held: "In our case the duty to adhere to fire regulations and not to engage in fire hazardous operations without the establishment of adequate fire prevention measures was a military duty imposed for the benefit of the Navy by Navy regulations * * *. The Navy is therefore responsible for [Bartole's and Cleaves'] actions." *Ibid.* After concluding that Bartole and Cleaves had negligently violated the regulations, the court remanded "for the limited purpose of determining" the amount of respondent's damages. *Id.* at 7a.

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[2] The court also referred to a regulation providing that " 'only repairs of a minor nature * * * may be accomplished in public quarters, garages, or the hobby shop spaces' " (App., *infra*, 3a), and noted that the regulations further stated: " '[T]he prevention of fire in administrative and quarters areas is a moral and legal responsibility of all personnel, requiring alertness, strict adherence to fire regulations, and intelligent application of fire prevention safeguards. Fire hazards are not acceptable within the naval establishment. The goal of fire prevention and protection programs is the *total prevention* of loss of life and property by fire.' " *Id.* at 3a-4a.

REASONS FOR GRANTING THE PETITION

In three recent cases, including this one, the Ninth Circuit has expanded the liability of the United States by making the government responsible whenever damage results from conduct that violates a base regulation. In each instance, the court reversed a district court dismissal of the action based on a determination that an analogous private employer would not be liable under state law. Here, the court concluded that two servicemen working on a personal car on their own time were acting within the scope of their employment because a base regulation governed "fire hazardous operations." In *Lutz*, on which the court here relied, it concluded that a base regulation governing the control of privately owned pets made an airman's failure to control his dog an activity performed within the scope of his employment. And in *Doggett* v. *United States*, 875 F.2d 684, 688 (9th Cir. 1989), the court, also relying on *Lutz*, concluded that servicemen drinking in a tavern on a naval base were acting within the scope of their employment when they failed to detain an intoxicated companion, as authorized by a base regulation. These decisions, which contrast sharply with the approach followed in other circuits, have the effect of turning the United States into a virtual insurer of the conduct of members of the service on military bases. They ignore the vital distinction between, on the one hand, housekeeping and safety regulations—regulations resulting from the fact that many people not only work on a military base but also live there (often with their families)—and, on the other hand, rules governing the conduct of service members on the job.

1. In each of these cases, the Ninth Circuit has erred, as a matter of federal law, by failing to con-

sider whether an analogous private employer would be liable under state law. The FTCA provides that "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. However, rather than analyzing the case under state law, the court in *Lutz* stated that "[m]ilitary housing presents a unique situation." 685 F.2d at 1183. The court repeated that statement in this case. App., *infra*, 5a. In *Doggett*, also relying on *Lutz*, the court "emphasize[d] that the regulation governs conduct only on the military base." 875 F.2d at 688. Having concluded that military bases are "unique," in none of the three cases did the court of appeals satisfy the requirement of the FTCA by determining whether a state court would hold a private employer liable in similar circumstances.[3]

Military bases are not unique in the respects noted by the court of appeals. Private employers likewise own property and make rules to govern the conduct of employees while on that property, even when they are not on duty; indeed, private employers sometimes house employees (and their families) on company property.[4] The court of appeals should therefore have

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[3] In this case, the only citation to state law in the court of appeals' opinion is to a case stating a general proposition of California law. App., *infra*, 5a (citing *Jeffrey Scott E.* v. *Central Baptist Church*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (1988)).

[4] See, *e.g.*, *Martinez* v. *Hagopian*, 182 Cal. App. 3d 1223, 1230, 227 Cal. Rptr. 763, 767 (Cal. App. 1986) (refusing to hold an employer liable for a tort caused by a farmworker, since "[t]o hold otherwise would be to essentially impose a theory of strict liability on the employer for all employee torts during after-hours social activities on the employer's premises, a result not permitted under settled law").

considered whether a private employer in California would be liable if an employee, while off duty and engaged in personal affairs on the employer's property, caused an injury because he did not take adequate safety precautions as required by the employer's regulations.[5] Here, the district court judge, who formerly sat on the California Superior Court and the California Municipal Court, stated that "[t]he imposition of *respondeat superior* liability upon the United States in this case would clearly be an imposition upon the military of a liability far broader than that of a private employer" under California law. App., *infra*, 13a.[6]

2. In addition, the Ninth Circuit's repeated reliance on base regulations is misplaced. Servicemen cannot be said to be acting within the scope of their employment merely because they reside on a base and are subject to base regulations. That the Navy was not acting as Bartole's and Cleaves' employer in issuing the regulations on which the Ninth Circuit relied is made clear in this case by the fact that the fire regulations are not directed solely to employees but

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[5] As the district court in this case recognized (App., *infra*, 12a), the significance of the distinction between a service member's on-duty and off-duty activities is underscored by 28 U.S.C. 2671, which limits "scope of his office or employment" for active duty military employees to actions "in [the] line of duty." For the relevance of state law to this determination, see *Williams* v. *United States*, 350 U.S. 857 (1955).

[6] We are not asking the Court to decide whether the district court's understanding of state law is correct. Rather, since we contend that the court of appeals erroneously failed to determine whether an analogous private employer would be liable under state law, we ask the Court to reverse and remand with instructions that the court of appeals make that determination.

to all "Public Quarters Residents." C.A. E.R., Exh. D, at 3. Surely, a service member's spouse or child who violates a fire regulation while trying to fix the family car could not be held on that basis to have been acting within the scope of anyone's employment.

In a case very much like *Lutz*, involving an attack by a dog owned by a serviceman, the District of Columbia Circuit understood the difference between regulations governing employees and regulations governing residents. After noting that, in addition to pet-control requirements, the base regulations "require[d] base residents to use certain size pots and pans, to replace electrical fuses, and to refrain from smoking in bed," the court stated that "[t]hese duties are not imposed by the military in its role as an employer and they do not run to the employer's benefit." *Nelson* v. *United States*, 838 F.2d 1280, 1283-1284 (D.C. Cir. 1988).[7] The District of Columbia Circuit expressly disagreed with the approach taken by the Ninth Circuit. It stated: "There seems * * * to be no principled limit to the reasoning in *Lutz*, so that the case would seem to make the government an insurer as to all manner of bizarre incidents. * * * To hold the government potentially liable for all damage done by conduct on a military base that violates any one of the many base regulations would expand liability in ways inconsistent with the idea that the FTCA must be strictly interpreted as a limited relinquishment of sovereign immunity." *Id.* at 1284.[8]

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[7] The court in *Nelson* went on to hold that the government was liable as landowner for failure to remove or control a dog that responsible officials knew was dangerous. 838 F.2d at 1285-1286.

[8] In criticizing the Ninth Circuit's approach, the District of Columbia Circuit noted that "whether a breach of military

Thus, there is an express conflict in the circuits on the question presented.[9]

Although the Ninth Circuit stated in *Lutz* that it was "not suggest[ing] that every act of a base resident is within the scope of his employment" (685 F.2d at 1183), that suggestion is contradicted by the decisions here and in *Doggett*. At least when there is a relevant base regulation governing the conduct of those on base property, the prediction of the D.C. Circuit in *Nelson* (838 F.2d at 1284) is being fulfilled: in the Ninth Circuit, the government has become "an insurer as to all manner of bizarre incidents" occurring on military bases.[10] Indeed, under *Lutz*, this development was almost inevitable, since "[m]ilitary regulations typically govern a wide range of base residents' activities, touching most aspects of

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regulations subjects the government to tort liability must depend upon whether analogous duties exist under local tort law." 838 F.2d at 1284. It thus rejected the notion that military bases are unique, so that state law need not be consulted in determining whether the United States is liable under the FTCA.

[9] In *Piper* v. *United States*, 694 F. Supp. 614, 618 (E.D. Ark. 1988), another case involving injuries caused by a dog, the court concluded that since a base regulation governed control of pets, "[t]he analysis by the Ninth Circuit Court of Appeals in *Lutz* * * * is applicable to the facts developed." The court added, "but *compare, Nelson* v. *U.S.*" *Ibid.* *Piper* is currently pending on appeal in the Eighth Circuit. No. 88-2612 (argued June 16, 1989).

[10] The First Circuit long ago rejected the argument that "anything [a serviceman] was doing in the residence was in the scope of his employment." *Merritt* v. *United States*, 332 F.2d 397, 399 (1964). In that case, a fire was caused by a serviceman who was smoking in bed.

private and public life." 838 F.2d at 1284.[11] The Ninth Circuit's unwarranted expansion of the federal government's waiver of sovereign immunity requires correction by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1989

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[11] The base regulations in this case confirm the District of Columbia Circuit's statement. For example, regulations at the Point Mugu Naval Base prohibit the attachment of extension cords to coffeemakers, require lint traps in clothes dryers to be cleaned often, and warn residents to "religiously" observe speed limits on the base. C.A. E.R., Exh. B, at 34, 35.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-5728

D.C. No.

CV-83-2332-RSWL

BARBARA ANN WASHINGTON, individually, and as Guardian Ad Litem for: CHRISTA M. WASHINGTON, a minor, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

[Filed Feb. 21, 1989]

OPINION

Before: JAMES R. BROWNING, MARY M. SCHROEDER and JOHN T. NOONAN, JR., Circuit Judges.

OPINION

NOONAN, Circuit Judge:

Barbara Ann Washington brought suit on her own and her minor daughter Christa's behalf against the United States of America (the government) and two members of the United States Navy, Larry Bartole and Neil Cleaves, for injuries suffered by Christa at the U.S. Naval Housing Quarters, Point Mugu, California. Jurisdiction was under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. The mother's claim was dismissed for lack of subject matter jurisdiction because she had not filed an administrative tort claim with the Navy, 38 U.S.C. § 2675(a). Christa's claim was tried to the court, which made findings of fact and conclusions of law and entered judgment for the government. Christa Washington appeals. We reverse.

FACTS

At 6:40 p.m., September 19, 1980, in the base housing facilities of the Navy at Point Mugu, California, two active duty members of the Navy, Larry Bartole and Neil Cleaves, were attempting to start Cleaves' 1964 Rambler. The car was in the garage assigned to Cleaves. It had not been operative for several months. Cleaves had given it a basic tune-up and oil change and it still would not run.

The main garage door was closed; a side door was open. Cleaves was in the car, turning on the ignition when he thought appropriate. Bartole tried to prime the carburetor by pouring gasoline from a coffee can into the throat of the carburetor. The engine backfired. Flames shot from the carburetor. Bartole jerked the can back and spilled gas over his hand.

His hand caught fire. He ran to the side door, tripped, and sent the blazing can out the door into the yard. Christa Washington was just outside the door. She was struck by the fiery gasoline. It severely burned the right side of her head, face and neck and right shoulder, arm, wrist and hand.

At the time of the incident Bartole and Cleaves were on authorized liberty status and had completed their ordinary work for the day for the Navy. Christa, aged ten, was the daughter of a serviceman residing in a naval housing unit at Point Mugu. Her family's unit was directly across from Cleaves'. The great majority of the 567 housing units at the base were occupied by families with more than one child.

A Navy regulation provided that "only repairs of a minor nature, such as basic tune-up, lube adjustments and oil changes may be accomplished in public quarters, garages or the hobby shop spaces." A booklet issued to all servicemen housed on the base carried an introductory message from Captain James E. Webb, commanding officer of the Naval Air Station. Captain Webb stated: "This brochure provides . . . the necessary regulations and rules for your assistance and guidance throughout your stay in government quarters." Within this booklet a section was entitled, "Fire, Safety and Police Regulations" and contained directions on the storage of gasoline but nothing specifically on the use of gasoline to prime carburetors.

Other regulations issued on January 5, 1979 and in effect at the time of the incident were explicitly directed to fire prevention. These regulations provided that "the prevention of fire in administrative and quarters area is a moral and legal responsibility

of all personnel, requiring alertness, strict adherence to fire regulations, and intelligent application of fire prevention safeguards. Fire hazards are not acceptable within the naval establishment. The goal of fire prevention and protection programs is the *total prevention* of loss of life and property by fire" (emphasis in original). These regulations specified that "Public Quarters Residents" were responsible for "compliance with Fire Regulations" and "application of fire prevention safeguards in Quarters, housing, and facilities." The Fire Regulations that accompanied this regulation stated: "*Fire Hazardous Operations* shall not be conducted prior to establishment of adequate fire prevention measures and approved by the Fire Chief." (emphasis in original).

A report to the navy on the accident by Ensign David M. Anderson, Jr. stated that "[a]n accepted primer spray should have been used rather than gasoline to prime the carburetor . . . [U]sing an open coffee can to pour the gas was a contributing factor in the accident;" and that "using gasoline to prime the carburetor is not a safe practice but is relatively common."

ANALYSIS

The Federal Tort Claims Act waives the government's immunity to a suit for personal injuries caused by an "employee of the Government while acting within the scope of his office or employment. . . ." 28 U.S.C. § 1346(b). The scope of employment of a military member "means acting in line of duty." 28 U.S.C. § 2671. The military "line of duty" is defined by the applicable state law of respondeat superior. *United States v. Lutz*, 685 F.2d 1178, 1182 (9th Cir. 1982). Where as here, the facts of

the incident are not in dispute, the determination of the scope of employment is a question of law, reviewable de novo. *Id.* In this case California law applies. California defines "scope of employment" very broadly. *Doggett v. United States*, No. 86-6109, slip op. at 12432 (9th Cir. Oct. 3, 1988). The California test for determining scope of employment "turns on whether '(1) the act performed was either required or "incident to his duties" . . ., or (2) the employee's misconduct could be reasonably foreseen by the employer in any event.'" *Id.* (quoting *Jeffrey Scott E. v. Central Baptist Church*, 197 Cal. App.3d 718, 243 Cal. Rptr. 128, 129 (1988).

The United States invokes *Hartzell v. United States*, 786 F.2d 964 (9th Cir. 1986), in which the negligent driving of an Air Force sergeant on vacation but en route to a new assignment was held not to be within the scope of her employment by the Air Force. Under the applicable state law, that of Arizona, this result was mandated. Moreover, as this court observed, it would be inconsistent with the limited waiver of immunity intended by the Federal Tort Claims Act to make the United States liable for "virtually any tort committed by a serviceman." *Id.* at 969. *Hartzell*, however, did not address the extent of military duty to assure security in military housing.

Our case involves the same considerations that governed the court in deciding *Lutz, supra.* In that case we said:

> Military housing presents a unique situation. Unlike employees and residents of cities and towns, the employment relationship of residents of military bases continues even during the off-duty at-home hours. We do not suggest that

> every act of a base resident is within the scope of his employment. Such a rule would impose upon the military a liability far broader than that of a private employer, contrary to the limited waiver intended by the FTCA. However, we agree with the Fifth Circuit that claims involving base residents require close examination of the employee's actions and the employer's interest in them.

Id. at 1183 (citations omitted).

In *Lutz* the control of a serviceman's dog was found to be a military duty imposed for the benefit of the Air Force by Air Force regulations on the dog's owner who was in base housing. In our case the duty to adhere to fire regulations and not to engage in fire hazardous operations without the establishment of adequate fire prevention measures was a military duty imposed for the benefit of the Navy by Navy regulations on servicemen in the Point Mugu naval housing. It is difficult to think of an older or more critical military duty imperative than the prevention of fire in camps or quarters. At all times on the housing base Bartole and Cleaves had the duty to act in conformity with the regulations designed to prevent fire. Their liberty status did not relieve them of the continuing duty to comply with the fire regulations governing military personnel who were "Public Quarters Residents." The Navy is therefore responsible for their actions in securing the base against fire hazards.

Bartole and Cleaves in fact violated the regulations and did so by employing a reckless method of priming the engine. Their negligence endangered all

within a short radius of their activity. Christa Washington was within that range and was injured as a proximate result of their negligent acts. Accordingly we reverse the judgment in favor of the United States and remand for the limited purpose of determining her damages.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-2332-RSWL

BARBARA ANN WASHINGTON, ETC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Dec. 11, 1987; Entered Dec. 14, 1987]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. This Federal Tort Claims Act action arises out of an incident which occurred on September 19, 1980, at approximately 6:40 P.M., in base housing facilities provided by the United States Navy at Point Mugu, California.

2. On September 19, 1980, at approximately 6:40 P.M., Messrs. Larry Bartole and Neil Cleaves were attempting to start the engine of Mr. Cleaves' 1964 Rambler automobile in Mr. Cleaves' garage, which

was located in base housing facilities at Point Mugu. At the time of the incident, Messrs. Bartole and Cleaves were attempting to start the engine of the Rambler, and in attempting to do so were pouring gasoline into the carburetor thereof from a coffee can.

3. At the time of the incident, Mr. Bartole was an active duty member of the United States Navy assigned to the Air Test and Evaluation Squadron 4 (VX-4), Pacific Missile Test Center, Point Mugu, California. At the time of the incident, Mr. Bartole was in authorized liberty status, having completed his work for the United States Navy for the day.

4. At the time of the incident giving rise to this suit, Mr. Neil Cleaves was also an active duty member of the United States Navy, and was assigned to the VXE-6 Squadron at Point Mugu Pacific Missile Test Center. At 6:40 P.M. on September 19, 1980, Mr. Cleaves was also in authorized liberty status, having completed his assigned work that day for the Navy.

5. In attempting to start the engine of the 1964 Rambler automobile, neither Mr. Bartole nor Mr. Cleaves were performing any action connected with any of their official United States Navy duties. The act of attempting to start the automobile by pouring gasoline into the carburetor was done purely for the private benefit of these individuals, and were purely private purposes, unrelated to any official military activity.

6. After Mr. Bartole poured gasoline into the carburetor of Mr. Cleaves' Rambler, attempting to prime it so that the engine would start, the engine backfired, and the flame from the carburetor ignited the gasoline held in the coffee can in Mr. Bartole's hand.

Mr. Bartole's hand caught fire from the gasoline when he jerked the can back and spilled gasoline over it. Mr. Bartole then pivoted toward the side door of the garage, tripped over something, thereby spilling the flaming can of gasoline out of the side garage door. The plaintiff, Christa M. Washington, a minor at the time, was just outside this side door playing in the yard adjacent to the garage, and was struck by the flaming gasoline.

7. The gasoline contained in the coffee can which Mr. Bartole was utilizing to prime the carburetor of the vehicle had, immediately prior to the incident, been properly stored in a one-gallon gasoline storage container. Immediately prior to the incident, a small portion of the gasoline was poured from this storage container into the coffee can. The aforesaid fire resulted from the use of the gasoline to prime the carburetor, and not from any act of improper storage of the gasoline.

8. Plaintiff Barbara A. Washington never filed an administrative tort claim with the United States Navy.

9. The above-described act of Messrs. Bartole and Cleaves in priming the carburetor with gasoline in their attempt to start the engine of the automobile did not constitute a repair of the automobile.

10. Even assuming, *arguendo*, that the aforesaid act of priming the carburetor of the automobile could be said to constitute a repair thereof, said act did not constitute a "major repair," as contemplated by applicable Navy regulations.

11. Neither Mr. Bartole nor Mr. Cleaves was acting within the course and scope of his employment with the United States Navy at the time of, or with respect to, the incident giving rise to this suit.

12. In connection with the incident giving rise to this suit, there was absolutely no assignment by the United States Navy to either Mr. Bartole and/or Mr. Cleaves, through regulation or otherwise, of a specific military duty in re the starting of the Rambler automobile engine, the performance of which furthered the interests of the United States Navy.

13. The incident giving rise to this suit did not result from a dangerous condition of which the United States had knowledge, nor did any "condition" herein (i.e. the use of gasoline to prime the carburetor of the engine) exist for such a long time that if the United States had exercised reasonable care in inspecting the premises, it would have discovered the condition in time to remedy it, or to give warning before any injury occurred. No employee of the United States was aware of the actions of Mr. Bartole and Mr. Cleaves in priming the carburetor of the Rambler with gasoline in an attempt to start it. Indeed, because the facts adduced demonstrate that the outside garage door was closed at the time of the incident, the United States was incapable of seeing the actions of these gentlemen, or of taking any steps to prevent such actions.

14. Because plaintiff Christa M. Washington is the dependent daughter of an active duty enlisted member of the United States Navy, her medical bills have, in large part, been paid by the United States pursuant to the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), Chapter 55, Title 10, United States Code, §§ 1071 through 1089. As of the date of trial, a total of $237,983.43 has been paid by CHAMPUS for medical bills for Christa Washington arising out of the incident giving rise to this suit.

15. No negligent or wrongful act of any employee of the United States of America while acting within the course and scope of his office or employment caused, or in any way contributed to, the damage alleged by plaintiffs.

16. Any of the foregoing Findings of Fact deemed to be Conclusions of Law are hereby incorporated into the Conclusions of Law.

CONCLUSIONS OF LAW

1. The Federal Tort Claims Act constitutes a waiver of the government's immunity to suit only as to personal injuries caused by "an employee of the government while acting within the scope of his office or employment . . . ." See 28 U.S.C. § 1346(b). Scope of employment for an active duty military employee means "acting in the line of duty." See 28 U.S.C. § 1346(b). Scope of employment for an active duty military employee means "acting in the line of duty." See 28 U.S.C. § 2671. The phrase "line of duty," in turn, is defined by the applicable state law of *respondeat superior*. *Williams v. United States*, 350 U.S. 857 (1955); *Dornan v. United States*, 460 F.2d 425, 427 (9th Cir. 1972).

2. Under the principles of *respondeat superior*, in California, the acts of Mr. Bartole and Mr. Cleaves herein, in attempting to start the privately owned Rambler automobile in their off-duty hours, were clearly their own, and done for personal purposes, totally unrelated to any United States Navy job or duty. The act of attempting to start the vehicle by priming its carburetor was thus not within the course and scope of the employment of Mr. Bartole and Mr. Cleaves with the United States. *Proietti v. Levi*, 530 F.2d 836, 840 (9th Cir. 1976); *Obst v. United States*

Postal Service, 427 F. Supp. 696, 698 (N.D. Cal. 1977); *Kish v. California State Auto Association*, 190 Cal. 256, 212 P. 27 (1922).

3. The reliance by plaintiffs upon the rationale embodied in *Lutz v. United States*, 685 F.2d 1178 (9th Cir. 1982) to establish liability on the part of the United States herein is misplaced. Where, as here, the conduct of Mr. Bartole and Mr. Cleaves did not involve a regular and specific military activity, the special characteristics of military employment do not bring their act of priming this private automobile with gasoline within the course and scope of their United States Naval employment for purposes of the Federal Tort Claims Act. This case is distinguishable from *Lutz* because the priming of the carburetor of the automobile in an attempt to start it did not violate any applicable Naval regulation. Moreover, even if said act did violate some applicable regulation, planitiffs have failed to show that any such regulation involved delegations to Cleaves and Bartole of specific military duties, the performance of which furthered the interests of the United States Navy. The imposition of *respondeat superior* liability upon the United States in this case would clearly be an imposition upon the military of a liability far broader than that of a private employer, and would be clearly contrary to the limited waiver of sovereign immunity attended by the Federal Tort Claims Act.

4. The defendant, United States of America, is not liable under *respondeat superior* based upon the "risk of the enterprise" doctrine because there is not a sufficient nexus between the employment of Cleaves and Bartole and their act of priming the carburetor which resulted in the injury to Christa Washington. A sufficient nexus cannot be found to exist under

these facts because the act of priming the carburetor was not foreseeable in light of the duties Cleaves and Bartole were hired to perform. *Martinez v. Hagopian*, 182 Cal. App. 3d 1223, 227 Cal. Rptr. 763 (1986).

5. The defendant, United States of America, is not liable herein on any theory of direct liability. This defendant, as a landlord, with respect to the government provided housing herein, is under a duty to exercise ordinary care in the use, maintenance, or management of such premises in order to avoid exposing parties to an unreasonable risk of harm. This duty of care, however, is owed only to such persons as the landlord, as a reasonably prudent person, under the same or similar circumstances, should have foreseen would be exposed to such a risk of harm. Additionally, the United States herein, as landlord, is not liable for an injury suffered by a person on its premises which resulted from a dangerous condition of which the landlord had no knowledge, unless the condition existed for such a long time that if the landlord had exercised reasonable care in inspecting the premises it would have discovered the condition in time to remedy it or to give warning before the injury occurred. *Bridgman v. Safeway Stores, Inc.*, 2 Cal. Rptr. 146; see also BAJI 8.20 (1977 Rev.). The facts of this case demonstrate that the United States had no knowledge of the act of priming the carburetor, giving rise to this suit, and, further, that said act did not exist for such a long time that, in the exercise of reasonable care in inspecting the premises, the United States would have discovered it.

6. The United States herein is also not subject to liability to plaintiff for physical harm caused by any dangerous condition which came into existence (as

here) after the lessee had taken possession, where the United States had no knowledge of the danger or participated in any way in creating it. See *Thompson v. United States*, 592 F.2d 1104 (9th Cir. 1979).

7. The claims of plaintiff Barbara Washington herein must be dismissed for want of subject matter jurisdiction. This plaintiff did not file an administrative tort claim, which is an absolute prerequisite to the subject matter jurisdiction of this Court against the United States under the Federal Tort Claims Act. See *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974).

8. No act or omission of any employee of the United States of America, while acting within the course and scope of his office or employment, caused, or in any way contributed to, the accident and the injuries alleged herein. Accordingly, judgment should be rendered herein in favor of the United States of America.

9. Any of the foregoing Conclusion [*sic*] of Law deemed to be Findings of Fact are hereby incorporated into the Findings of Fact.

DATED: December 10, 1987.

/s/ Ronald S. W. Lew

RONALD S. W. LEW
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-5728

DC# CV-83-2332-RSWL

BARBARA ANN WASHINGTON, individually, and as Guardian Ad Litem for: CHRISTA M. WASHINGTON, a minor, PLAINTIFF-APPELLANT

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed June 9, 1989]

ORDER

Before: BROWNING, SCHROEDER, and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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No. 89-482

In The

Supreme Court of the United States

October Term, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

BARBARA ANN WASHINGTON, as Guardian Ad Litem for CHRISTA M. WASHINGTON, a Minor,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The court of appeals determined that two servicemen who negligently injured a young girl were within the scope of their employment under California law so as to subject the government to liablity under the Federal Tort Claims Act for the severe injuries they caused. Is the question whether the court sufficiently analyzed state law "special and important" enough to merit certiorari review by this Court?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Barbara Ann Washington, as Guardian ad Litem for Christa M. Washington, a Minor, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 868 F.2d 332 (1989).[1]

[1] On October 12, 1989, the Clerk of the Court extended the time for filing respondent's brief to and including November 14, 1989.

INTRODUCTION

In 1980 ten-year old Christa Washington suffered severe burns over much of her face and body due to the conceded negligence of two Navy servicemen in the base housing area of the Naval Air Station at Point Mugu, California. The Court of Appeals for the Ninth Circuit held the servicemen were acting within the scope of their employment within the meaning of the Federal Tort Claims Act when the incident happened and thus found the government liable for Christa's injuries on the basis of respondeat superior.

In its sole Question Presented, the government claims the court reached this conclusion without determining whether an analogous private employer would be liable under state law, as required by the FTCA. It asks this Court to reverse and remand so the court of appeals can make that determination. It seeks to ascribe to the Ninth Circuit the view that the FTCA's state law requirement does not apply to torts occurring on military bases because they are "unique." But as we show, the Ninth Circuit has never adopted that simplistic notion, and has conscientiously applied state law in this case as in each of its decisions in this area. Indeed, in the decision below, the court states expressly, "In this case California law applies," and sets out California's two-prong test for respondeat superior liability. *Washington v. United States*, Appendix to Petition for Certiorari, 5a.

The government's real complaint is that it does not like the result reached by the court of appeals; no doubt it is unhappy that "California defines 'scope of employment' very broadly" (*id.*) and that California law requires

respondeat superior liability in this case. Of course, the government knows the futility of asking this Court to review questions of state law; consequently, it has tried to cast the issue as one of federal law. As we show below, that issue is a false one, since the Ninth Circuit fully complied with the requirements of the FTCA. And if the court's analysis of state law is less detailed or precise than the government would have liked, that is hardly a "special and important" reason to grant certiorari. In any event, the court's imposition of liability on the government is supported by three different bases under California law.

Obviously aware of the shakiness of its ground, the government seeks to increase its chances for review by suggesting a conflict among the circuits. As we demonstrate, there is no conflict between the Ninth Circuit's decision in this case and the decision of any other circuit, and any appearance of a conflict with respect to other Ninth Circuit decisions is illusory.

Christa Washington has waited almost half her life to be fairly compensated for the terrible injuries she received. The government has raised no question qualifying for review by this Court, and its petition should be summarily denied so the district court can determine Christa's damages as the Ninth Circuit ordered.

STATEMENT OF THE CASE

A. Statement Of Facts.[2]

At 6:40 p.m., on September 19, 1980, in the base housing facilities of the Navy at Point Mugu, California, two active duty members of the Navy, Larry Bartole and Neil Cleaves, were attempting to start Cleaves' 1964 Rambler. The car was in the garage assigned to Cleaves. It had not been operating for several months. Cleaves had given it a basic tune-up and oil change and it still would not run.

The main garage door was closed; a side door was open. Cleaves was in the car, turning on the ignition at Bartole's direction. Bartole tried to prime the carburetor by pouring gasoline from a coffee can into the throat of the carburetor. The engine backfired. Flames shot from the carburetor. Bartole jerked the can back and spilled gas over his hand. His hand caught fire. He ran to the side door, tripped and sent the blazing can out the door into the yard. Christa Washington was just outside the door playing with friends. She was struck by the fiery gasoline. It severely burned the right side of her head, face and neck and right shoulder, arm, wrist and hand.

At the time of the incident Bartole and Cleaves were on authorized liberty status and had completed their ordinary work for the day for the Navy. Christa, aged ten, was the daughter of a serviceman residing in a naval housing unit at Point Mugu. Her family's unit was directly across from Cleaves'. The great majority of the

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[2] This statement, with minor changes, is taken from the court of appeals' opinion.

567 housing units at the base were occupied by families with more than one child. Cleaves' home was a popular place for neighborhood children to gather.

A Navy regulation provided that "only repairs of a minor nature such as basic tune-up, brake adjustments and oil changes may be accomplished in public quarters garages or the Hobby Shop spaces." A booklet issued to all servicemen housed on the base carried an introductory message from Captain James E. Webb, commanding officer of the Naval Air Station. Captain Webb stated: "This brochure provides . . . the necessary regulations and rules for your assistance and guidance throughout your stay in government quarters." Within this booklet a section was entitled, "Fire, Safety and Police Regulations" and contained directions on gasoline storage but nothing specifically on the use of gasoline to prime carburetors.

Other regulations issued on January 5, 1979 and in effect at the time of the incident were explicitly directed to fire prevention. These regulations provided that "the prevention of fire in administrative and quarters area is a moral and legal responsibility of all personnel, requiring alertness, strict adherence to fire regulations, and intelligent application of fire prevention safeguards. Fire hazards are not acceptable within the naval establishment. The goal of fire prevention and protection programs is the *total prevention* of loss of life and property by fire." (emphasis in original). These regulations specified that "Personnel" as well as "Public Quarters Residents" were responsible for "compliance with Fire Regulations," and that "Public Quarters Residents" were responsible for "application of fire prevention safeguards in Quarters

housing and facilities." One of the Fire Regulations that accompanied this regulation stated: "*Fire Hazardous Operations* shall not be conducted prior to establishment of adequate fire prevention measures and approved by the Fire Chief." (emphasis in original).

These regulations were not intended as mere guidelines, but were duties with which all personnel and base residents were obligated to comply at all times, even when on "liberty" status. Navy personnel were subject to military discipline for failing to comply with the regulations.

A report to the Navy on the accident by Ensign David M. Anderson, Jr. stated that "[g]asoline should have been added to the gas tank rather than directly to the carburetor, . . . [a]n accepted primer spray should have been used rather than gasoline to prime the carburetor, . . . [u]sing an open coffee can to prime the carburetor was a contributing factor in the accident," and "[u]sing gasoline to prime the carburetor is not a safe practice but is relatively common."

B. Procedural History

Christa Washington, through her mother as guardian ad litem, sued the United States under the Federal Tort Claims Act ("FTCA").[3] Judgment was for the United States. The district court concluded Bartole and Cleaves

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[3] Bartole and Cleaves were dismissed as defendants early in the litigation. After contending at trial that the men were not negligent, the government conceded their negligence in the court of appeals.

were not acting within the course and scope of their employment. It also concluded the men "did not violate any applicable Naval regulation," thus distinguishing the case from *Lutz v. United States*, 685 F.2d 1178 (9th Cir. 1982). Appendix to Petition ("Pet. App."), 13a.

The court of appeals, in an opinion by Judge Noonan, reversed.[4] The court held Bartole and Cleaves were acting within the scope of their employment, as broadly defined under California law, and remanded for the limited purpose of determining damages. Pet. App., 7a.

The United States petitioned for rehearing with a suggestion for rehearing en banc, on grounds similar to those it now raises in the present petition. The panel denied the petition and noted the full court had been advised of the suggestion for en banc rehearing, and no judge requested a vote on the matter. *Id.* at 16a.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

CONTRARY TO THE GOVERNMENT'S CONTENTION, THE COURT OF APPEALS DID BASE ITS DECISION ON STATE LAW.

The sole question presented in the petition asks whether the "court of appeals erroneously failed to determine whether under state law an analogous private employer would be liable under similar circumstances."

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[4] We discuss the details of the court's opinion in the body of the brief.

The government claims the Ninth Circuit failed to consider state law in this and two other FTCA cases. Pet., 6-7. It states it is not asking this Court to determine California law on the issue, but only "to reverse and remand with instructions that the court of appeals make that determination." Pet., 8, n. 6.

But the court of appeals has already done so, as is clear from a reading of its entire opinion, not just the portions excerpted in the government's petition. After setting out the applicable statutory framework linking the scope of employment of a military member to the state law of respondeat superior, the court states:

> *In this case California law applies.* California defines "scope of employment" very broadly. *Doggett v. United States*, No. 86-6109, slip op. at 12432 (9th Cir. Oct. 3, 1988). The California test for determining scope of employment "turns on whether '(1) the act performed was either required or "incident to his duties" . . . , or (2) the employee's misconduct could be reasonably foreseen by the employer in any event.' " *Id.* (quoting *Jeffrey Scott E. v. Central Baptist Church*, 197 Cal.App.3d 718, 243 Cal.Rptr 128, 129 (1988)). Pet. App., 5a. (Emphasis added.)[5]

The government complains that this is "the only citation to state law in the court of appeals' opinion. . . ." Pet., 7, n. 3. But it is the only one needed, for it accurately

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[5] The court then distinguishes the case on which the government had relied, *Hartzell v. United States*, 786 F.2d 964 (9th Cir. 1986), in part on the ground that its holding that the service person was not within the scope of her employment was mandated by the applicable state law of Arizona. Pet. App., 5a.

and succinctly sets out Califoria's well-established two-prong test for respondeat superior liability. See also, e.g., *Clark Equipment Co. v. Wheat*, 92 Cal.App.3d 503, 520, 154 Cal.Rptr. 874, 882 (1979); *Alma W. v. Oakland Unified School Dist.*, 123 Cal.App.3d 133, 138, 176 Cal.Rptr. 287, 289 (1981), cited with approval in *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438, 447, 769 P.2d 948, 256 Cal.Rptr. 766, 771-74 (1989). The court impliedly holds there is respondeat superior liability under the first prong of the test, i.e., an act performed incident to Bartole and Cleaves' duties – duties which the court holds included the "military duty to assure security in military housing" (Pet. App., 5a) and a "military duty [not to engage in fire hazardous operations without the establishment of adequate fire prevention measures] imposed for the benefit of the Navy by Navy regulations. . . ." Pet. App., 6a.

There can be no doubt that in reaching the conclusion that the government is vicariously liable for Bartole and Cleaves' negligence, the court of appeals applied state law.[6] California's law of respondeat superior was exhaustively briefed by both parties and was squarely before the court. Whether the court of appeals could have cited more authority, or provided a more detailed analysis, or stated its conclusions more directly simply are not "special and important" questions that merit the expenditure of this Court's resources.

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[6] Similarly, the Ninth Circuit grounded its decision in state law in the two other decisions which the government claims contain no consideration of state law, *Lutz v. United States*, 685 F.2d 1178, 1183 (9th Cir. 1982) and *Doggett v. United States*, 875 F.2d 684, 688 (9th Cir. 1989).

(Continued on following page)

Despite the government's insistence that it seeks only to have the court of appeals make a determination based on state law, its real complaint is obvious – it disagrees with the court's *conclusion* regarding state law. The subtext of the government's argument is that under a correct application of California law, it could not be found liable for Bartole and Cleaves' negligence. Indeed, it suggests that the district court judge, who found no respondeat superior liability, may have had a better understanding of California law than the court of appeals judges by virtue

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(Continued from previous page)

In *Lutz*, the court discusses Montana's law of respondeat superior at some length. 685 F.2d at 1182-83. According to the court, the Montana test differentiates between an employee who acts purely for his own benefit and one who is delegated a task which furthers his employer's interest. *Id.* at 1182. The district court had found that the serviceman's decision to own a dog was purely for his own benefit, and thus concluded there was no respondeat superior liability. But the court of appeals held the scope of employment analysis must be applied, not to the decision to own a dog, but to the "acts or omissions in controlling the dog. . . ." *Id.* The government delegated to servicemen who lived on base "a specific military duty" to control their dogs, "the performance of which furthered the interests of the Air Force. . . ." On that basis the court concludes the serviceman "therefore acted in the line of duty and within the scope of his employment." *Id.* at 1183.

In *Doggett*, the court of appeals expressly states, "Under the FTCA, the question of liability is determined with reference to state law" (875 F.2d at 686), and goes on to discuss California's broad test for scope of employment. *Id.* at 687. In fact, the court observes that California's principles of respondeat superior might support an even broader imposition of liability than the plaintiff was seeking. *Id.* at 687. The case also contains an extensive discussion of negligence principles under California law. *Id.* at 688-94.

of having served as a municipal and superior court judge in California. Pet., 8. But as the Ninth Circuit has noted, consideration of such matters "is neither proper nor efficient. It shifts the focus from the appropriate legal authorities to the biography of the judge." *Matter of McLinn*, 739 F.2d 1395, 1400 (9th Cir. 1984) (en banc). The Ninth Circuit properly gives no special deference to the district court's interpretation and application of state law but reviews those questions de novo. *Id.* at 1397.

The government's disingenuousness regarding the true basis of its disagreement with the court of appeals is understandable. This Court has made very clear its disinclination to review the correctness of determinations of state law made by the courts of appeals. See, e.g., *U.S. v. S.A. Empresa De Viacao Aerea Rio Grandense*, 467 U.S. 797, 816, n. 12 (1984) ("we generally accord great deference to the interpretation and application of state law by the Courts of Appeals"), *Pacific Gas & Elec. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 214 (1983) ("Our general practice is to place considerable confidence in the interpretations of state law reached by the federal courts of appeals"), *Runyon v. McCrary*, 427 U.S. 160, 181 (1976) ("We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so heavily contingent upon an analysis of state law. . . ."). So rather than claim the court of appeals erred in determining state law, the government asserts it erred "as a matter of federal law" in failing to consider state law (Pet., 6-7) – an assertion belied by the opinion itself.

The court of appeals' consideration and treatment of state law was proper and adequate. Since this is the only

question presented in the petition, the petition should be denied for that reason alone.

II.

THE COURT OF APPEALS' DECISION IS CORRECT ON THREE DIFFERENT BASES UNDER CALIFORNIA LAW.

Granting the government's request to remand this case to the court of appeals to consider state law would accomplish nothing, since the result the court reached is supported by at least three different theories under California law, any one of which is sufficient to support its ruling. All three bases were thoroughly briefed by both sides. In light of this Court's understandable reluctance to involve itself in disputes concerning state law, we summarize the applicable state law in the briefest fashion to demonstrate not only the correctness of the court of appeals' decision but the futility of a remand.

A. Under The First Prong Of California's Respondeat Superior Test, The Servicemen Were Within The Scope Of Their Employment At The Time Of The Accident Because Their Employment Duties Included Complying With Regulations Requiring Them To Secure The Base Against Fire Hazards – Regulations Enforced Through The Threat Of Military Discipline.

California has a two-prong test to determine an employer's vicarious liability for its employee's torts. Under the first prong, liability is imposed if "the act performed was either required or incident to his duties." *Alma W. v. Oakland Unified School Dist.*, 123 Cal.App.3d

133, 139, 176 Cal.Rptr. 287, 289 (1981). Those "duties" necessarily include all the requirements, rules and regulations the employer imposes on the employee. If the employee performs his duties negligently, and as a result injures someone, the employer is vicariously liable.

In this case, Bartole and Cleaves' employment duties included complying with specific fire prevention regulations in addition to performing their ordinary Navy jobs.[7] The Navy considered those duties every bit as important as satisfactory "job" performance. After all, they were designed, in part, to protect the Navy's own property and employment force. The Navy promulgated the regulations because "[f]ire hazards are not acceptable within the naval establishment. The goal of fire prevention and protection programs is the *total prevention* of loss of life and property by fire." The Navy made clear that the regulations were not mere guidelines but were mandatory requirements enforced by threat of military discipline. Military members were required to comply with the regulations even when on "liberty" status. When Bartole and Cleaves attempted to start a car in an exceedingly hazardous way, they violated their naval employment duties just as plainly as if they had negligently repaired a submarine. As the Fifth Circuit has noted in this context, "Soldier was a repair parts specialist and had a duty to mow a

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[7] For example, one regulation provided:

> *Fire Hazardous Operations* shall not be conducted prior to establishment of adequate fire prevention measures and approved by the Fire Chief.

This regulation was imposed on "Personnel" as well as "Public Quarters Residents." C.A. E.R., Exh. D, at 3.

portion of the lawn surrounding his quarters. Both were duties assigned to soldier." *Craft v. United States*, 542 F.2d 1250, 1255 (5th Cir. 1976).

It is in this context that the Ninth Circuit's reference to the "uniqueness" of military base housing incidents is best understood: *Washington v. United States*, Pet. App., 5a, quoting *Lutz v. United States*, 685 F.2d 1178, 1183 (9th Cir. 1982). The court does not mean they are "unique" in the sense that they are exempt from normal FTCA principles – the position the government seeks to ascribe to the Ninth Circuit. Rather, when the military, as employer and provider of housing, imposes duties on its employees that continue even during their off-duty, at-home hours, "claims involving base residents require close examination of the employee's actions and the employer's interest in them." *Washington v. United States*, Pet. App., 6a, quoting *Lutz*, 685 F.2d at 1183. That sort of "close examination" animated the Ninth Circuit's finding of liability in this case, as in *Lutz*.

Further support for this conclusion is found in California's "bunkhouse rule" which provides that an employee who lives on the employer's premises may be acting within the scope of his employment even while engaged in leisure pursuits during off-duty hours if he is making reasonable use of the employer's premises. *Argonaut Ins. Co. v. Workmen's Compensation Appeals Bd.*, 247 Cal.App.2d 669, 677-78, 55 Cal.Rptr. 810, 818-19 (1967); *Rodgers v. Kemper Constr. Co.*, 50 Cal.App.3d 608, 620, 124

Cal.Rptr. 143, 149-150 (1975).[8] The California Supreme Court has declared that the rule applies even when the employee, while not required to live on the premises, receives lodging as part of his compensation. *Truck Ins. Exchange v. Ind. Accident Comm'n*, 27 Cal.2d 813, 816-17, 167 P.2d 707-08 (1946); see also *Petray v. Keeble*, 15 I.A.C. 62 (1928) ("normal activity connected with the use of living quarters provided by the employer as a part of the contract of hire is incidental to the employment, and injury while engaged in such activity arises out of the employment").

On facts similar to those in this case, a laborer who lived in a cabin on his employer's ranch was burned on a Sunday as he stood on ranch premises watching his employer's brother attempt to start an automobile by priming it with gasoline. The gasoline suddenly burst into flames, and the brother threw it over his shoulder to get rid of it; it struck the employee, burning him. The Commission ruled the injury was compensable even though the employee was dressed in his Sunday clothes and was planning to go to town to spend the day as he pleased. It found that the injury arose out of the employment, concluding "the risk from instrumentalities permitted by the employer to be on the premises was a risk of the employment." *American Motorists Ins. Co. v. Ind. Accident Comm'n*, 4 Cal.Comp. Cases 251, 252 (1939). So, too, the risk from the instrumentalities (automobiles and

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[8] California courts frequently rely on workers' compensation cases in analyzing respondeat superior issues. *Perez v. Van Groningen & Sons, Inc.*, 41 Cal.3d 962, 967-68, 719 P.2d 676, 227 Cal.Rptr. 106, 108 (1986); *Hinman v. Westinghouse Elec. Co.*, 2 Cal.3d 956, 960, 471 P.2d 988, 88 Cal.Rptr. 188, 190 (1970).

gasoline) permitted by the Navy to be in the base housing area was an inherent risk of the employer's operation.

Thus, the Ninth Circuit's approach fully comports with California law imposing vicarious liability on employers for their employees' torts occurring at a time and place where the employee is subject to the employer's regulations. Since an analogous private employer could be found vicariously liable under California law, the Ninth Circuit's decision was correct.

B. Under The Second Prong Of California's Respondeat Superior Test, The Servicemen Were Within The Scope Of Their Employment At The Time Of The Accident Because Their Negligent Acts Were Reasonably Foreseeable Risks Inherent In The Navy's "Enterprise" Of Providing Living Quarters For Military Personnel.

California has long recognized that an employer's responsibility for the torts of its employees extends beyond acts which are required or incident to their employment duties, and includes acts which are "inherent in or created by the enterprise." *Hinman v. Westinghouse Elec. Co.*, 2 Cal.3d at 960, 471 P.2d 988, 88 Cal.Rptr. at 190 (1970).

> One way [California courts] determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, "foreseeability" in this context must be distinguished from "foreseeability" as a test for negligence. In the latter sense "foreseeable" means a level of probability which would lead a prudent person to take

> effective precautions whereas "foreseeability" as a test for *respondeat superior* merely means that in the context of the particular enterprise *an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.* [Citations.] In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer. *Rodgers v. Kemper Constr. Co.*, 50 Cal.App.3d at 618-19 (emphasis added).

Rodgers' foreseeability test has been approved by the California Supreme Court. *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438, 450, n. 9, 769 P.2d 948, 256 Cal.Rptr. 766, 773, n. 9 (1989); *Perez v. Van Groningen & Sons, Inc.*, 41 Cal.3d at 967-68, 719 P.2d 676, 227 Cal.Rptr. at 107-08.

Applying the risks of the enterprise/foreseeability test to the facts of this case leads to only one conclusion – Bartole and Cleaves were within the scope of their employment at the time of the accident.

The enterprise in question is the United States armed services. The function of the armed services is to protect and defend the United States at all times. *United States ex rel Toth v. Quarles*, 350 U.S. 11, 17 (1955) (it is "the primary business of armies and navies to fight or be ready to fight wars should the occasion arise"); *Brown v. Glines*, 444 U.S. 348, 354 (1980) ("Military personnel must be ready to perform their duty whenever the occasion arises"). Providing on-base housing for military personnel and their families is an integral part of carrying out the function of protecting and defending the United States. It ensures

that personnel are nearby in case of emergency even during off-duty hours. It is indisputable that the United States (as well as its citizens) benefits immeasurably from having a large contingent of personnel available 24 hours a day all over the world to carry out its aims.

The question under California law is whether Bartole and Cleaves' actions were foreseeable – were they so "unusual or startling" that it would seem unfair to include the loss resulting from them among other costs of the employer's business? Clearly not. When an employer undertakes to provide housing accommodations – including garages – for its employees and their families, and permits them to bring private automobiles on the property, to repair them and to store gasoline, it can hardly be said to be unusual, startling, unreasonable or unforeseeable for an accident such as befell Christa Washington to occur.[9]

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[9] The government suggests a contrary result would obtain under *Martinez v. Hagopian*, 182 Cal.App.3d 1223, 227 Cal.Rptr. 763 (1986). Pet., 7, n. 4. But as respondent demonstrated in the Ninth Circuit, *Martinez* is completely distinguishable. Briefly, in that case a worker killed a visitor during a drunken brawl at a farm labor camp after working hours. The Court of Appeal held the worker was not within the scope of his employment. The only duties the employer imposed on his employees were to harvest grapes and refrain from drinking during working hours. 182 Cal.App.3d at 1226, 227 Cal.Rptr. at 765. Unlike the employees in this case, the farm workers were under no duty to maintain the security of the labor camp or prevent fights, drinking, fires, or anything else. In fact, during off-duty hours, laborers were "free to do 'anything at the time the law permit[s] them to do.' " *Id.* In contrast, Bartole and Cleaves were obligated to comply with military regulations at all times, even when on "liberty status."

The California Supreme Court's latest articulation of the rationale underlying the respondeat superior doctrine reinforces this conclusion. In *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438, 451, 769 P.2d 948, 256 Cal.Rptr 766, 773-74 (1989), the court noted three principal reasons for imposing liability on an enterprise for the risks incident to it: (1) It tends to provide a spur toward accident prevention; (2) it tends to provide greater assurance that accident victims will be compensated (i.e., through insurance); and (3) it tends to provide reasonable assurance that, like other costs, accident losses will be broadly and equitably distributed among the beneficiaries of the enterprise. The issue in *John R.* was whether a school district is liable when a teacher sexually molests a student. Based on an analysis of the three factors, the court found no respondeat superior liability.

All three considerations point toward liability in this case. First, by imposing liability, the government would have added impetus to attempt to prevent the kind of accident that occurred here – for example, by forbidding automobile repairs (especially those involving gasoline) in base housing areas or, at a minimum, in unventilated areas. Second, finding the government liable for Christa's injuries assures she would be compensated for them. This factor is extremely important in this case, since – unlike the sexual molestation in *John R.* – Bartole and Cleaves' negligence in repairing the car was within "the normal range of risks for which costs can be spread and insurance sought." *John R.*, 48 Cal.3d at 451, 256 Cal.Rptr. at 774. Moreover, not only did the Navy not require or even suggest service people should purchase homeowner's or renter's liability insurance, it misled them into believing

they did not need it. The Navy recommended that, for their own protection, base residents purchase insurance for damages to personal household goods. "The Government doesn't assume responsibility for loss of your personal property through fire, theft, or other means." C.A. E.R., Exh. B at 34. It is unconscionable that the government did not see fit to tell service people it also does not assume responsibility for liability for their injuries to human beings. Third, imposing liability for Christa's injuries on the government assures that the costs would be spread among all the beneficiaries of the enterprise that is the United States armed services (i.e., tax-payers) and not fall solely on one wholly innocent victim.

Bartole and Cleaves were within their scope of employment under the "foreseeability" prong of California's respondeat superior test. The Ninth Circuit's imposition of liability on the United States was correct under this aspect of California law.

C. In Addition To Being Vicariously Liable For Christa Washington's Injuries On The Basis Of Respondeat Superior, The United States Was Directly Liable Under California Law As A Landowner On Whose Property Dangerous Activities Took Place With Its Knowledge.

A third theory supports the Ninth Circuit's decision – direct landowner liability.[10] California has long imposed

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[10] The United States, as owner and operator of the naval base, is liable to the extent a private party would be under similar circumstances. State law determines such liability. *Henderson v. United States of America*, 846 F.2d 1233, 1234 (9th Cir. 1988).

on landowners the duty to take appropriate measures to restrain activity of which the landowner is or should be aware, and which the landowner should realize is dangerous. *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 810, 167 P.2d 729, 733 (1946). The landowner has a duty " 'to take affirmative action to control the wrongful acts of third persons which threaten invitees where the [owner] has reasonable cause to anticipate such acts and the probability of injury resulting therefrom.' " *Isaacs v. Huntington Memorial Hosp.*, 38 Cal.3d 112, 123, 695 P.2d 653, 211 Cal.Rptr. 356 (1985). Foreseeability of future harmful activity may be established other than by evidence of prior similar incidents on the premises. *Id.* at 129; *Musgrove v. Ambrose Properties*, 87 Cal.App.3d 44, 51, 150 Cal.Rptr. 722, 725 (1978) (shopping center owner found liable when patron injured by bicycle; owner knew bicycles were commonly ridden on the premises but had never received a complaint before). In analyzing foreseeability, California courts follow "the well-settled rule that 'what is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence.' " *Isaacs v. Huntington Memorial Hosp.*, 38 Cal.3d at 129; *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal.3d 49, 57-58, 665 P.2d 947, 192 Cal.Rptr. 857, 861-62 (1983).

Thus, the appropriate inquiry here is whether the government had a duty to take appropriate measures to restrain its personnel from priming carburetors by pouring gasoline into them in the residential area, when the evidence showed the Navy was aware that this practice, while relatively common, was unsafe. Without a doubt, there was such a duty.

As its regulations show, the Navy freely permitted "minor mechanical repairs" of automobiles to be performed in residents' garages and carports without fully defining what those were. Service people frequently did tune-ups and more complicated repairs on their cars there. RT 119. The Navy also permitted gasoline to be stored in garages. RT 167. The Navy was aware that the common practice of priming a carburetor by pouring gasoline directly into it was unsafe, yet it took no steps to directly restrain that practice. In its official investigatory report following the accident, the Navy expressly acknowledged that *"using gasoline to prime the carburetor is not a safe practice but is relatively common."* (emphasis added).

Having the knowledge that priming a carburetor with gasoline can be unsafe but is relatively common imposed on the Navy a duty to make an attempt to stop or regulate the activity. The Navy could have prohibited the practice altogether, or required that it be performed outdoors, or at the very least instructed service people not to engage in it without making sure that no children are playing nearby. The failure of the Navy to take such simple steps to address this known problem demonstrates a breach of its duty to maintain safe premises and establishes its direct liability for Christa Washington's injuries.

III.

EVEN IF THERE WERE AN ACTUAL CONFLICT IN THE CIRCUIT COURTS ON THE QUESTION PRESENTED – AND THERE IS NONE – IT WOULD BE INAPPROPRIATE FOR THIS COURT TO RESOLVE IT IN THE CONTEXT OF THIS CASE AND PREMATURE IN ANY EVENT.

Buried in the middle of the government's petition is the contention that "there is an express conflict in the

circuits on the question presented." Pet., 10. The government draws this conclusion from the District of Columbia Circuit's criticism of *Lutz v. United States*, 685 F.2d 1178 (9th Cir. 1982) in *Nelson v. United States*, 838 F.2d 1280, 1283 (D.C. Cir. 1988) ("We doubt the adequacy of the *Lutz* rationale"). However, upon closer examination, it becomes clear that no actual conflict exists, particularly with respect to *this case*. And even if a budding conflict could be postulated, it is far too early for this Court to consider the matter.

Lutz and *Nelson* arose on virtually identical fact patterns and came to different conclusions as to the government's respondeat superior liability for a serviceman's failure to control his dog, which bit a child. Yet despite this seeming conflict, and despite the *Nelson* court's express criticism of *Lutz*, there is no actual conflict because each circuit's decision is based on local law. As we explained earlier (see p. 10, n. 6), *Lutz* is expressly based on Montana's law of respondeat superior, which imposes liability on an employer for the acts of an employee which further the employer's interest. 685 F.2d at 1182. Citing Montana authority, the Ninth Circuit concluded that the serviceman's performance of his duty to control his dog "furthered the interests of the Air Force," and thus held he acted within the scope of his employment. *Id.* at 1183. Similarly, *Nelson* is based on the law of respondeat superior as applied by the District of Columbia. And while the test is similar to Montana's (whether the employee was furthering his employer's interest), the *Nelson* court's citation of District of Columbia authorities indicates the test is narrowly applied there. *Id.* at 1282-83. Thus, in grounding their decisions on local precedent, both circuits satisfied the FTCA's requirement that scope

of employment be defined by local law.[11] "As to questions controlled by state law . . . , conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

There is a second reason that no real conflict exists between *Lutz* and *Nelson*. The *Nelson* court's discussion of respondeat superior liability, with its criticism of *Lutz*, is unnecessary to the court's holding – which is that the government was directly liable for the child's injuries as a landowner with knowledge that the dog was dangerous. 838 F.2d 1285-87.[12] The appellate court *affirmed* the district court's judgment of liability. Thus, the court of appeal's rejection of liability based on a respondeat superior theory is by no means the holding of the case. There is serious question whether any District of Columbia court would be bound by it.

Third, even assuming a possible conflict between *Nelson* and *Piper* on the one hand and *Lutz* on the other, it

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[11] The same is true of *Piper v. United States*, ___ F.2d ___ (8th Cir. 1989), decided by the Eighth Circuit after the petition for certiorari was filed in this case. *Piper* is another dog bite case, like *Lutz* and *Nelson*. The court held that a serviceman who failed to control his dog was not acting within the scope of his employment. Although the court states it "decline[s] to follow" *Lutz*, and "adopt[s] the reasoning" of *Nelson*, it reaches its conclusion by applying Arkansas principles of respondeat superior.

[12] By the same token, the Eighth Circuit in *Piper* remanded the case to the district court to determine whether the government might be liable under a similar theory.

does not follow a conflict exists between *Nelson* and *Piper* and *this case*, which arose on very different facts. (Significantly, the *Piper* court does not even cite *Washington*, even though it was decided eight months previously.) *Nelson*, *Piper*, and *Lutz* all involve a base regulation requiring service people to control their dogs. The government (like the *Nelson* and *Piper* courts) expresses the fear that imposing liability for this and other such "housekeeping" duties would make the government " 'an insurer as to all manner of bizarre incidents' occurring on military bases." Pet., 6, 10. Such language should not obscure what happened in this case: a child resident of a military base was horribly and permanently injured by the admitted grossly negligent conduct of two servicemen, conduct which violated fire prevention and base security regulations whose express goal was "the *total prevention* of loss of life and property by fire" because "fire hazards are not acceptable within the naval establishment." As the Ninth Circuit observed, "It is difficult to think of an older or more critical military duty imperative than the prevention of fire in camps and quarters." *Washington v. United States*, Pet. App., 6a. This duty is far from trivial, and its violation resulted in a fire that was hardly "bizarre;" sadly, it was all too predictable.

Moreover, it was a duty expressly imposed upon all service personnel, not just base residents, and its breach could give rise to military discipline. The government, echoing Judge Bork's reasoning in *Nelson*, attempts to draw a distinction between regulations governing employees and those governing base residents, contending that only the former can define a service person's scope of employment. Whether or not such a distinction

makes sense in the context of military life is not an issue in this case, since the key regulations at issue here expressly applied to all "Personnel":

> e. *Personnel* are responsible for (1) Compliance with Fire Regulations. . . .C.A. E.R. Exh. D, at 3. See also *id.* at 1 ("the prevention of fire in administrative and quarters areas is a moral and legal responsibility of *all personnel.* . . ."). (Emphases added.)

That "Public Quarters Residents," including spouses and children, were *also* responsible for compliance with the regulations does not change their status as separate and independent duties imposed on employees.

Finally, even if *Nelson* (and now *Piper*) are seen to conflict with the Ninth Circuit's decisions, the government exaggerates the extent of the conflict among the circuits. The government hints at a conflict between the Ninth and First Circuits, based on the First Circuit's rejection of the argument that " 'anything [a serviceman] was doing in the residence was in the scope of his employment.' *Merritt v. United States*, 332 F.2d 397, 399 (1964)." Pet., 10, n. 10. But of course the Ninth Circuit is in complete agreement. "We do not suggest that every act of a base resident is within the scope of his employment. Such a rule would impose upon the military a liability far broader than that of a private employer, contrary to the limited waiver intended by the FTCA." *Lutz*, 685 F.2d at 1183.

In short, even if a conflict can be said to exist, the lower courts have not yet had the opportunity to thoroughly flesh out the issues.[13] As we suggest here, it is possible to harmonize all the decisions as based on local law; future litigation may develop that thesis further. There is much to be said for letting early conflicts ripen, subjecting them to the tests of time, thought, comment and advocacy before this Court steps in to resolve them. See *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date").

In view of the real doubt whether a conflict exists at all (especially with respect to this case), and if, so, whether the lower courts have had ample time and opportunity to develop the issues, it is not surprising the government buried its claim of conflict in the middle of its petition, without highlighting it as a Question Presented. If even the government does not take its claim of conflict seriously, there is hardly cause for this Court to do so.

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[13] In *Piper*, the Eighth Circuit simply adopts the reasoning and language of the *Nelson* decision.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 89-482

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

BARBARA ANN WASHINGTON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR CHRISTA M. WASHINGTON, A MINOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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15 pp

TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE PETITIONER

1. Respondent devotes virtually all of her brief in opposition (at 7-22) to the argument that the petition for a writ of certiorari presents this Court with a question of state law. But this is precisely what the petition does *not* do. Rather, we ask this Court to review an important question of federal law and to remand the case for consideration of the remaining state law issue under the appropriate federal standard.

As pointed out in our petition (at 6-8), the decision below is one of a series of three Ninth Circuit

decisions under the Federal Tort Claims Act in which the liability of the United States has been predicated solely on the determination that the injury occurred on a military base and was caused by military personnel acting in violation of a base regulation.[1] In none of the three cases did the conduct of the military personnel occur while they were on duty or relate to the performance of their military duties. Rather, in each case, the injuries arose as a result of acts or omissions of the service members while engaged in personal affairs.

In the first of these cases—*Lutz* v. *United States*—the Ninth Circuit based its conclusion on its observation that "[m]ilitary housing presents a unique situation." 685 F.2d at 1183. In light of that unique quality, the court concluded, "the employment relationship of residents of military bases continues even during the off-duty at-home hours." *Ibid.* That rationale was expressly relied upon by the Ninth Circuit both in this case (Pet. App. 5a-6a) and in *Doggett* v. *United States* (875 F.2d at 688).

It is that rationale that we ask this Court to reject because it constitutes an erroneous application of the Federal Tort Claims Act. In the first place, in its emphasis on the "uniqueness" of military bases, the Ninth Circuit ignores both the analogous situations that arise in the private sector and the clear command of the FTCA that liability may be based only

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[1] The other two decisions are *Doggett* v. *United States*, 875 F.2d 684, 688 (9th Cir. 1989) (that part of the opinion dealing with government liability for the conduct of personnel who were drinking while off duty), and *Lutz* v. *United States*, 685 F.2d 1178 (9th Cir. 1982) (airman's failure to control his pet dog). In *Doggett*, as in the present case, the events took place in California; in *Lutz*, they took place in Montana.

on a determination that a private person would be liable in similar circumstances under state law. 28 U.S.C. 1346(b), 2674. Moreover, it disregards the express insistence of Congress, in 28 U.S.C. 2671, that a military employee is *not* to be treated differently from an employee in the private sector; actions held to be "within the scope of his office or employment" are to be limited to actions taken in the "line of duty." Finally, by failing to distinguish between the military's role as administrator of a community in which service members and their families lead private lives and its role as employer of the service members themselves, the court below has effectively made the United States an insurer of compliance with every rule and regulation governing life on military bases. No such insurance function was intended by the FTCA's limited waiver of sovereign immunity.

Once this error has been remedied, the case should be remanded for application of controlling state law under the proper standard—a standard free from any notion that liability can or should be premised on the "unique" nature of a military base. In our view, the district court was correct in concluding (Pet. App. 13a-14a) that the outcome under state law is clear: the United States is not liable for any negligence in this case under the doctrine of *respondeat superior*. But the question of state law is not one that needs to be addressed by this Court.[2]

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[2] As noted in our petition (at 7 n.3), the court below cited only one state case, at the outset of its discussion, and cited it only for the general scope of *respondeat superior* liability under state law. Moreover, in that case, *Jeffrey Scott E.* v. *Central Baptist Church*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (1988), the court held that a teacher's employer was *not* liable for the teacher's sexual abuse of a student. Although

2. We indicated in our petition (at 9-11) that the rationale of the court below—relying as it did solely on the violation of a base regulation by the service-

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the court below never went beyond this citation in its discussion of state law, respondent attempts in its brief in opposition to set forth three separate theories for imposing liability under state law. Like the court of appeals, respondent has failed to cite a single analogous state case holding a defendant liable in tort.

Respondent's first theory—that the employment duties of military personnel extend to compliance with *all* base rules and regulations—relies principally on the state's "bunkhouse rule" (see Br. in Opp. 14-15). But that rule was developed in the context of state workers' compensation laws and has never been applied in the *respondeat superior* context. See *Martinez* v. *Hagopian*, 182 Cal. App. 3d 1223, 227 Cal. Rptr. 763 (1986), relied on by the district court in this case (see Pet. App. 14a). Moreover, the California Supreme Court has emphasized that the tests of liability under workers' compensation law and tort law are "not identical," and that workers' compensation cases are therefore "not controlling precedent" in resolving a *respondeat superior* question. *Perez* v. *Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 967 n.2, 719 P.2d 676, 227 Cal. Rptr. 106, 108 n.2 (1986).

Respondent's second theory—which relies on an assessment of the risks inherent in the employer's enterprise—was squarely held by the district court to be inapplicable here "because there [was] not a sufficient nexus between the employment of Cleaves and Bartole [the servicemen involved] and their act of priming the carburetor." Pet. App. 13a. Respondent cites no authority under state law that suggests the contrary in an analogous situation, while the district court's holding is strongly supported by *Martinez*.

Finally, respondent's third theory—that the United States is directly liable as a landowner on whose property dangerous activities took place—is not a theory based on *respondeat superior* at all. It was rejected by the district court on the facts of this case (Pet. App. 14a-15a), and was not adverted to by the court of appeals.

men involved—was squarely in conflict with the rationale of the District of Columbia Circuit in *Nelson* v. *United States*, 838 F.2d 1280 (1988). The Ninth Circuit's rationale is now also in conflict with both the reasoning and the result of the Eighth Circuit's decision in *Piper* v. *United States*, No. 88-2612 (Oct. 10, 1989), *reprinted in* App., *infra*, 1a-7a. Like *Lutz* and *Nelson*, that case involved an action against the United States by a dog-bite victim. The court of appeals, reversing the district court (which had relied on Ninth Circuit precedent), held that "[w]hile this case factually resembles the *Lutz* case, we decline to follow it. Instead we adopt the reasoning of another similar case, *Nelson* v. *United States*." *Id.* at 5a. The court then went on to say: "Military bases regulate a wide variety of subjects, some of them trivial, such as housekeeping. It stretches the statute too far to say that any act or omission by a servicemember, if covered by a regulation, represents conduct in the line of duty." *Id.* at 6a. Finally, the court quoted at some length from the *Nelson* opinion, emphasizing that in its capacity of running what is, in essence, a "company town," the military "imposes many duties on military personnel, not all of which are plausibly viewed as imposed by the government in its role as employer." *Ibid.* (quoting *Nelson*, 838 F.2d at 1283).[3]

The question presented in this case could as easily have arisen if an off-duty service member, while at home, had caused injury by violating a base regula-

[3] After holding that the United States was not responsible for any negligence on the part of the serviceman who owned the dog, the court in *Piper* remanded the case to the district court to determine whether other base personnel may have been negligent in the performance of their job-related duties.

tion prohibiting smoking in bed (see App, *infra*, 6a) or banning the attachment of extension cords to coffeemakers (see Pet. 11 n.11). The question in those instances, as in this one, is whether the mere existence of a base regulation, regardless of its nature or function or the circumstances of its application, makes the United States the insurer of compliance with that regulation by military personnel. There is a conflict in the circuits on that question.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

NOVEMBER 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2612

JUNE D. PIPER, as Mother and Guardian of Matthew D. Durran, a Minor, APPELLEE,

v.

UNITED STATES OF AMERICA, APPELLANT.

Submitted: June 16, 1989
Filed: October 10, 1989

Appeal from the United States District Court
for the Eastern District of Arkansas

Before BEAM, Circuit Judge, HEANEY and BRIGHT, Senior Circuit Judges.

BRIGHT, Senior Circuit Judge.

The United States appeals the district court's judgment awarding damages under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1982), for dog-bite wounds sustained by Matthew Durran, age eleven, while residing on a military base. The

district court held the Government liable for the negligence of a servicemember, TSgt. Robert Williams, who permitted his dog to run free in violation of regulations promulgated by the Little Rock (Arkansas) Air Force Base.[1] The district court ruled that Williams' responsibility to control his pet was within the scope of his employment in the military and rendered the United States liable on a respondeat superior theory. On appeal the United States asserts that TSgt. Williams did not act within the scope of his employment when he neglected to keep his dog under control at his personal residence. We agree with the Government's position and reverse and vacate the judgment, but remand for a determination of whether other grounds exist to support the award of damages.

I. BACKGROUND

At the time of the incident, Matthew Durran lived with his mother, June Piper, a National Guard enlisted person, at Little Rock Air Force Base (LRAFB). TSgt. Robert Williams, the owner of a large Airedale dog named Arby, lived nearby.

On the afternoon of January 18, 1986, Matthew returned from school on the bus and saw Arby in his backyard, sitting at the rear patio glass door and barking at the dogs in the house. Matthew called for the dog to follow him towards its own home. The dog attacked Matthew, knocked him to the ground and bit him on the forehead and around the scalp. The school bus driver, witnessing the incident, sounded her horn and the dog ran away. The bus

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[1] The opinion of the district court is reported. *Piper* v. *United States*, 694 F. Supp. 614 (E.D. Ark. 1988).

driver then administered first aid to Matthew and called for an ambulance.

Matthew suffered considerable pain during and after the attack. He received several lacerations and puncture wounds on his head requiring treatment and approximately eight follow-up visits. The attack left scars on Matthew's head and resulted in some temporary emotional damage.

The attack on Matthew did not represent Arby's first attack upon a person or the dog owner's first failure to control the dog. On January 11, 1985, one year prior to the attack on Matthew, airbase security police found Arby running at large and cited TSgt. Williams for failing to control his dog. As a result, the commanding officer verbally counseled TSgt. Williams on the need to control his pet.

On January 26, 1985, Arby bit three-year old LeChelle Stimson through the nose while she visited in TSgt. Williams' home. Although no one witnessed the incident, LeChelle's father told the security police that the dog bit the child when she pulled its whiskers. TSgt. Williams again received verbal counseling on the need to control his dog, but the security police did not report the incident as a nuisance, relying on the father's statement that LeChelle had provoked the dog.

On March 30, 1985, Arby bit one of Williams' sons at the Williams' home. Williams reported this incident to the base veterinarian who recorded it in a log book, but took no further action. The district court found that the veterinarian did not report the incident to security police because the veterinarian considered the incident a private matter.

Base regulations permit pets on the base as long as they do not become a nuisance, are not allowed to

run free and are under the control of the owner at all times. LRAFB Regulation 125-2 (May 20, 1981). The base commander, security police and pet owner share responsibility for enforcing this regulation. The regulation further requires that any pet reported twice as a nuisance be removed from the base. Evidence in the record also suggests that emergency room personnel are required to report all dog-bite incidents to the security police, but the district court made no specific finding in this regard.

The district court found that Arby did not habitually run free, but noted that the evidence conflicted on this point. The court also found that except for the three biting incidents, no evidence indicated that the dog had exhibited aggressive or vicious tendencies.

Matthew's mother, who brought the suit on behalf of Matthew, argued that the Government was liable under the FTCA, on either of two theories. First, Mrs. Piper contended that TSgt. Williams had acted negligently in the line of duty by failing to maintain control over Arby. Second, Mrs. Piper contended that airbase personnel responsible for maintaining order on the base had negligently permitted Arby to remain on the base when they knew or should have known of his dangerous propensities.

After a three-day bench trial, the district court found for Matthew and entered an award of damages in the amount of $9,600. As we have already mentioned, the court held TSgt. Williams acted in the line of duty because base regulations delegated to him the duty to control his dog. The district court relied on *Lutz v. United States*, 685 F.2d 1178 (9th Cir. 1982), a factually similar case, for this proposition of law. The trial court determined that violation

of LRAFB Regulation 125-2 (relating to control of pets) by Williams amounted to negligence in the line of duty and held the United States liable under the FTCA. The district court did not decide whether the United States could be liable for the negligence of other airbase personnel in duties relating to control of animals.

II. DISCUSSION

While this case factually resembles the *Lutz* case, we decline to follow it. Instead, we adopt the reasoning of another similar case, *Nelson v. United States*, 838 F.2d 1280 (D.C. Cir. 1988), where the court held that an owner's failure to control his pet dog did not occur in the line of duty.

As a preliminary matter, we observe that the FTCA waives the Government's immunity to suit only for personal injuries caused by government employees acting within the scope of their employment. 28 U.S.C. § 1346(b). Military employees are within the scope of employment when they act in "the line of duty." 28 U.S.C. § 2671. "Line of duty" takes its meaning from the applicable state law of respondeat superior. *Williams v. United States*, 350 U.S. 857 (1955) (per curiam). Under Arkansas law an employee acts within the scope of employment or in the line of duty when he acts for his employer's benefit or furthers his employer's interest. *Orkin Exterminating Co. v. Wheeling Pipeline, Inc.*, 263 Ark. 711, 567 S.W.2d 117 (1978).

Borrowing the rationale from the *Lutz* case, the district court reasoned that TSgt. Williams had been delegated a duty to control his dog because of regulations relating to control of pets and because violation of these regulations subjects servicemembers to dis-

cipline. That court concluded that Williams' failure to control the dog therefore occurred in the line of duty.

This reasoning will not stand. Military bases regulate a wide variety of subjects, some of them trivial, such as housekeeping. It stretches the statute too far to say that any act or omission by a servicemember, if covered by a regulation, represents conduct in the line of duty. *Nelson*, 838 F.2d at 1283-84. In this case and in many cases, connection between the duty imposed by the regulation and military service is far too tenuous to conclude that the FTCA applies. As the District of Columbia Circuit observed:

> Under *Lutz*, all duties imposed by military regulation, no matter how trivial, could fall within the serviceman's line of duty and thus within the employer-employee relationship. In the unique context of life on a military base, however, the government is much like an old-fashion "company town." Within this multi-faceted relationship, the military imposes many duties on military personnel, not all of which are plausibly viewed as imposed by the government in its role as employer.
>
> Bolling Air Force Base regulations, for example, require base residents to use certain size pots and pans, to replace electrical fuses, and to refrain from smoking in bed. These duties are not imposed by the military in its role as an employer and they do not run to the employer's benefit. Rather, they are incidental regulations designed to ensure that the base functions under conditions of common consideration and orderliness that enhance community life; as such, they are designed to benefit all residents of the hous-

> ing community. Because such duties, although established by military regulations, do not run to the benefit of the employer and are linked only incidentally with the employment relationship, they cannot be said to be discharged within the scope of employment.

Id. at 1283-84. We believe this analysis is sound and adopt it. Accordingly, the United States is not derivatively liable under the FTCA for negligence on the part of TSgt. Williams.

There is, however, another theory on which the Government might be liable. The district court heard evidence but did not decide whether other air base personnel negligently performed their duties. *Cf. Nelson*, 838 F.2d 1284-87. We cannot say from the record before us whether the commanding officer, security police or the veterinarian knew or should have known of the potential threat posed by Arby. On remand, however, the district court should decide this issue on the present record or it may permit the parties to introduce additional evidence on this issue.

III. CONCLUSION

Accordingly, we reverse the judgment of the district court and remand for a determination of whether there are other grounds to support the award of damages in favor of Matthew.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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